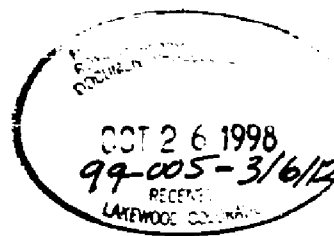




October 23, 1998

By Fax and Federal Express



FOIA Coordinator
Minerals Management Service
U.S. Department of the Interior
Mail Stop 2053, Atrium Building
Herndon, VA 22070
Attn: Carole de Witt

FOIA Coordinator
Royalty Management Program
Minerals Management Service
U.S. Department of the Interior
P.O. Box 25165
Denver Federal Center, Building 85
Mail Stop 3062
Denver, CO 80225
Attn: Greg Kann

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LAKESIDE COLLEGE

Re: Freedom of Information (FOIA) Request

Dear Madam and Sir:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Department's regulations, 43 C.F.R. Part 2, we hereby request a copy of the documents identified below. The scope of this request is intended to include documents located at all DOI offices, including all DOI regional, district and local offices. For purposes of this request, the term "document" includes, but is not limited to, any writing, report, letter, manual, note, electronic data, memorandum, guide, guidance, instruction, text, correspondence, communication, computer data, drawings, graphs, charts, photographs and other data compilations from which information can be obtained.

The term "document" also includes, but is not limited to, the following:

- (1) The identified document and all drafts of the document;
- (2) The so-called "surname copy" of the document, which reflects which officials subordinate to the signed, cleared the document for his or her signature;
- (3) Briefing papers and notes (including electronic notes) of any meetings regarding the substance of the document;
- (4) Memoranda, including legal memoranda, prepared on the issues discussed in the document; and
- (5) Other documents received from or sent to (1) local, city, state, tribal or other federal governmental agencies (2) the DOI Office of the Inspector General and (3) Members or Committees of Congress.

We request the above information for the following documents and materials:



1. Please provide any information on the Department's strategy for designing and implementing the structure of the Wyoming RIK pilot program. Please include information on the choice of Wyoming; on the selection of the volumes included in the program; the choice of specific leases, lessees, and types of crude (e.g., sweet, sour, asphaltic) selected for the program; and how RIK production is expected to be marketed and transported.
2. Please provide any information on how the Wyoming RIK program will be evaluated, both operationally and for revenue potential. Please include any documents discussing the data that will be collected for analysis, how comparisons will be made with revenues that would be achieved for the same leases in the absence of the pilot program, what production will be considered to be comparable, whether the existence of the pilot program will influence the value of production that is not included in the pilot program, how will the data be analyzed, and who will perform the analysis.
3. Please provide any information assembled for evaluating bids for the Wyoming RIK pilot program. This request is intended to cover both information collected before and after bids were submitted.
4. Please include any documentation on the selection of financial solvency criteria.
5. Please provide copies of all Wyoming RIK pilot bids, including successful and unsuccessful bids.
6. Please provide any documents describing why MMS accepted or rejected each bid. Please specifically include any documents describing the reasons for rejecting bids for Wyoming sweet crude.
7. Please provide any evaluations, documentation, or data describing estimates and calculations of additional revenue MMS expects to receive from the Wyoming RIK pilot program.
8. Please provide all documents prepared for (including documents distributed at the meeting), during, or after the September 14, 1998 meeting in Casper, Wyoming that are related to information discussed at that meeting, including all documents supporting discussions at the meeting of revenues expected to be achieved by the pilot program.
9. Please provide all information on the structure, operation, and evaluation of subsequent phases of the RIK pilot program, including any proposed modifications or revisions considered for a new invitation to bid.
10. Please provide all information that is similar to preceding items 1-9 for the Section 8(g) pilot program announced on October 19, 1998 between the Minerals Management Service and Texas' General Land Office.

In providing this information, please exclude only that information which would identify an individual lessee or payor. For example, we wish to receive information on collections that are attributable to specific products, locations, and time periods, but we do not need information on the identity of the parties.



We are willing to pay all reasonable reproduction and search fees provided by regulation. Please provide an estimate of the cost before proceeding.

Should you determine that any of the requested information is exempt from disclosure, please delete such allegedly exempt portions and identify in your response the nature of the deleted information and the reason for the deletion. This consent is intended to facilitate your prompt response and in no way waives our entitlement to complete documents. In the event that we are denied any document or any portion of any requested document, please identify each document with particularity and specify the statutory basis for the denial of each document or portion withheld and the names and titles of the persons responsible for the denial.

We understand that the Denver FOIA office has only two full-time positions and one part-time position, and we further understand that the volume of FOIA requests being received is exceeding the capacity of the current staffing arrangement. The information we are requesting, as well as the information we have previously requested under FOIA submissions, is needed quickly. We ask that our requests, including this most recent request, be fulfilled within the required 20-day period.

We ask that your response be directed to Linden C. Smith, Barents Group LLC, 2001 M Street, N.W., Washington, DC 20036 (202) 467-3828, fax (202) 728-0546. We look forward to hearing from you within twenty (20) working days pursuant to Section (a)(6)(A)(i) of the Act.

Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Linden C. Smith", is written over the word "Sincerely,".

Linden C. Smith
Managing Director

EXEMPTION 5

that otherwise confidential agency memoranda are not protected under the privilege if they are merely interpretations of agency law.²⁰

The nature of this privilege, and its partial overlap with the deliberative process privilege and attorney work-product privilege under Exemption 5, make it no less subject to potential discretionary disclosure under current policy standards.²⁰ (See discussions of such discretionary disclosure under Applying the "Foreseeable Harm" Standard, below, and Discretionary Disclosure and Waiver, below.)

Other Privileges

The FOIA neither expands nor contracts existing privileges, nor does it create any new privileges.²⁰ However, the Supreme Court has indicated that Exemption 5 may incorporate virtually all civil discovery privileges; if a document is immune from civil discovery, it is similarly protected from mandatory disclosure under the FOIA.²⁰ Because Rule 501 of the Federal Rules of Evidence allows courts to create privileges as necessary,²¹ there exists the potential

²⁰(...continued)

Supp. 40, 43 (W.D. Okla. 1982) (agency investigators reporting information used by agency attorneys).

²¹ Tax Analysis, 117 F.3d at 619-20.

²⁰ See FOIA Update, Spring 1994, at 3-6 ("OIP Guidance: Applying the 'Foreseeable Harm' Standard Under Exemption Five") (pointing out that attorney-client privilege can be waived with consent of client agency).

²⁰ See Association for Women in Science v. Califano, 566 F.2d 339, 342 (D.C. Cir. 1977); see also *Badhwar v. United States Dept. of the Air Force*, 829 F.2d 182, 184 (D.C. Cir. 1987) ("To decide [whether a recognized privilege should be abandoned] in a FOIA case would be inappropriate, as Exemption 5 requires the application of existing rules regarding discovery, not their reformulation.").

²⁰ See *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799-800 (1984); *ETC v. Grolier Inc.*, 462 U.S. 19, 26-27 (1983).

²¹ See *Tammam v. United States*, 445 U.S. 40, 47 (1980); see, e.g., *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1124-25 (7th Cir. 1997) (recognizing judge-fashioned "law enforcement investigatory privilege") (non-FOIA case); *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 571-73 (E.D. Mo. 1991) (recognizing "ombudsman privilege" under Rule 501 of Federal Rules of Evidence) (non-FOIA case); *Shabazz v. Scott*, 662 F. Supp. 90, 92 (S.D. Iowa 1987) (same) (non-FOIA case); see also *In re Sealed Case*, 121 F.3d 729, 751-52 (D.C. Cir. 1997) (recognizing "presidential communications privilege" that applies to "communications made by presidential advisers in the course of preparing advice for the President... even when these communications are not made directly to the President") (non-FOIA case). But cf. *In re Sealed Case*, No. 98-3069, 1998 WL 370584, at *1 (D.C. Cir. July 7, 1998) (continued...)

EXEMPTION 5

tial for "new" privileges to be applied under Exemption 5.²¹ However, one major caveat should be noted in the application of any discovery privilege under the FOIA: A privilege should not be used against a requester who would routinely receive such information in civil discovery.²¹

Nearly twenty years ago, the Supreme Court in *Federal Open Market Committee v. Merrill*²² found an additional privilege incorporated within Exemption 5 based upon Federal Rule of Civil Procedure 26(c)(7), which provides that "for good cause shown... a trade secret or other confidential research, development or commercial information" is protected from discovery. This qualified privilege is available "at least to the extent that this information is generated by the Government itself in the process leading up to the awarding of a contract" and expires upon the awarding of the contract or upon the withdrawal of the offer.²³ The theory underlying the privilege is that early release of such information would likely put the government at a competitive disadvantage by endangering consummation of a contract; consequently, "the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure should... serve as relevant criteria."²⁴

This harm rationale has led one court to hold that the commercial privilege may be invoked when a contractor who has submitted proposed changes to the contract requests sensitive cost estimates.²⁵ Based upon this underlying theory, there is nothing in *Merrill* to prevent it from being read more expansively to protect the government from competitive disadvantage outside of the contract setting, as the issue in *Merrill* was not presented strictly within such a

²¹(...continued)

1998) (declining to recognize proposed "protective function privilege") (non-FOIA case).

²² See, e.g., FOIA Update, Fall 1985, at 3-4 (suggesting that new privilege for settlement negotiations records should be recognized under Exemption 5). But see *Burka v. HHS*, 87 F.3d 508, 517 (D.C. Cir. 1996) (holding that for record to be found privileged, agency must show that it is protected in discovery for reasons similar to those used by agency in FOIA context).

²³ See, e.g., *United States Dept. of Justice v. Julian*, 486 U.S. 1, 9 (1988) (presentence report privilege, designed to protect report's subject, cannot be invoked against him as first-party requester); cf. *Badhwar*, 829 F.2d at 184 ("Exemption 5 requires application of existing rules regarding discovery, not their reformulation.").

²⁴ 443 U.S. 340 (1979).

²⁵ *Id.* at 360.

²⁶ *Id.* at 363.

²⁷ *Taylor Woodrow Int'l v. United States*, No. 88-429, slip op. at 5-7 (W.D. Wash. Apr. 6, 1989) (concluding that disclosure would permit requester to take "unfair commercial advantage" of agency).